UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

CC-1 LIMITED PARTNERSHIP D/B/A COCA-COLA PUERTO RICO BOTTLERS

Respondent Employer

and

Cases 24-CA-11018 et al.

CARLOS RIVERA, et al.

Charging Parties

and

UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901 INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Respondent Union Cases 24-CB- 2648, et al.

and

CARLOS RIVERA, et als.

Charging Parties

and

MIGDALIA MAGRIS, MARITZA QUIARA, SILVIA RIVERA, JESUS BAEZ, HUMBERTO MIRANDA, ORLANDO HERNÁNDEZ AND RAYMOND REYES Cases 24-CB- 2706, et al.

Charging Parties

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT EMPLOYER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Ana Beatriz Ramos-Fernandez
Isis Ramos-Melendez
Jose Luis Ortiz
Counsel for General Counsel
National Labor Relations Board
Region 24
525 FD Roosevelt Ave.
San Juan, PR 00918-1002
Website: www.nlrb.gov

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Comes now Counsel for the Acting General Counsel (herein CGC) and very respectfully submits before the Honorable Board, General Counsel's Answering Brief to the Respondent Employer's Exceptions to the Administrative Law Judge Decision (herein ALJD). Counsel for Acting General Counsel has already submitted its Exceptions to the Administrative Law Judge's

Decision and Brief in support thereof. While the same adequately addresses some of the issues raised by Respondent Employer's Exceptions, CGC would like to supplement it as follows:[1]

I. STATEMENT OF THE CASE

This case was tried before the Administrative Law Judge, Bruce D. Rosenstein, herein ALJ, on December 7 through December 17, 2009, and January 11, 2010, in San Juan, Puerto Rico, pursuant to a Third Consolidated Amended Complaint and Notice of Hearing in the CA cases and a Second Consolidated Amended Complaint and Notice of Hearing in the CB cases. The ALJ's Decision, herein ALJD, was issued on April 16, 2010.

A. The Administrative Law Judge's Decision

With regards to the allegations against Respondent Employer, the ALJ found that on September 9, 2008,[2] unit employees concertedly ceased work to protest that Respondent Employer tried to oust Union representative Jose Adrian Lopez from the Employer's facility. The ALJ further found that the work stoppage held on September 9 was protected under the Act and not in violation of the non strike clause as the CBA expired on July 1 and was extended only until July 31.[3] While the ALJ found that the work stoppage held on September 9 was protected and the CBA had expired, he found that four shop stewards (Carlos Rivera, Felix Rivera, Francisco Marrero and Romian Serrano) lost the protection of the Act because they encouraged other employees to abandon their work stations, that is, to join the work stoppage in contravention of the Shop Steward (Delegates) provisions of the parties' expired CBA.[4] However, the ALJ found that the termination

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[1]References are as follows: GC refers to General Counsel's "JX" refers to Joint Exhibits, Exhibits, "R" refers to Respondent's Exhibits, and "Tr" refers to the transcript of the hearing. "CGC" refers to Counsel for the Acting General Counsel; "RB" refers to Respondent's Brief; "ALJ" refers to the Administrative Law Judge; and ALJD" refers to the Administrative Law Judge's Decision.

[2] All dates refer to year 2008, unless otherwise noted.

[3] Respondent Employer did not file Exceptions as to these findings, and therefore, any subsequent attack to these findings has been waived.

[4] CGC excepted to this finding and in essence avers that article 12 of the expired contract as a waiver of Section 7 rights did not survive the expiration of the contract and that article 13 did not apply to the shop stewards, but rather, only to

of the fifth shop steward (Miguel Colon) was unlawful because there was no evidence in the record that he had arrived at the Employer's facility before the work stoppage had taken place, thus he did not instigate or promote the stoppage.

Further, the ALJ found that the unit employees engaged in an unfair labor practice strike from October 20 to October 22 to protest, in significant part, the discharge of the above-mentioned stewards, including the unlawful discharge of shop steward Miguel Colon. As a result, he found that the Employer unlawfully terminated the employment of thirty four (34) of the unit employees that engaged in said unfair labor practice strike, and conditioned the reinstatement of four (4) other strikers on the signing of an unlawful "last chance agreement" waiving their Section 7 rights. The ALJ also found that, later on, the Employer unlawfully terminated the employment of these four strikers because they allegedly breached the provisions of the "last chance agreement." Lastly, the ALJ dismissed the allegation that employee Dennes Figueroa was subsequently discharged because he participated in the strike.[5] The ALJ decision concerning the CB allegations are discussed separately in CGC's Answering Brief to Respondent Union's Exceptions.[6]

II. THE EXCEPTIONS

In its Exceptions Document, Respondent has enumerated 32 exceptions to the Administrative Law Judge's Decision. However, it is noted that although Respondent's Exceptions 1, 2, 3, 4, 5, 10, 13, 17 and 19, are related to the Administrative Law Judge's credibility findings, Respondent has failed to establish with specific grounds, any argument or citation of authority that the ALJ credibility findings are not supported by record evidence. The Board's established policy is

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union officials such as union business agents. CGC also contends that the imposing of higher discipline upon the shop stewards than the rest of the employees violates the mandates of the Act.

[5] CGC has filed exceptions to the ALJ failure to find that the termination of Dennes Figueroa was in violation of Sections 8(a) (1) and (3) of the Act.

[6] Regarding the charges against Respondent Union, the ALJ found that the Union violated Section 8(b)(1)(A) by expelling from union membership, removing from their Shop Steward positions, and imposing a fine of $10,000 to its members Migdalia Magriz, Martiza Quiara and Silvia Rivera because they attended a meeting the Coca Cola employees held on October 12, where a strike vote was ratified, and because they participated in the October 20-22 strike.

not to overrule an administrative judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Fantasia Fresh Juice Company, 339 NLRB No. 112 (2003); Diversified Case Company, 272 NLRB 1099, (1984); Standard Dry Wall Product, 91 NLRB 544 (1950). Respondent Employer has not met its burden of proof to establish by a preponderance of all relevant evidence that the ALJ credibility findings are incorrect and therefore, Exceptions 1, 2, 3, 4, 5, 10, 13, 17 and 19 should be found not supported by the record evidence and consequently entirely disregarded.

In addition, in its Exceptions 9, 15, 16, 18 and 20, Respondent is only challenging, as an error, the ALJ's alleged failure to make and/or include a specific finding in its decision without arguing the relevancy of such finding or how the inclusion of said finding will alter in any way the ALJ's final decision. The fact that an administrative law judge makes no specific reference to a part of a witness' testimony or piece of evidence does not necessarily imply that said evidence was not considered in the decision making process. Concluding the contrary would require judges to write extremely voluminous decisions in order to endless exhaust with specific findings all the documentary and testimony submitted during a trial. Thus, CGC contends that Respondent has failed to comply with the requirements set fort in section 102.46 (b)[7] and in accordance with section 102.46 (b) (2)[8] the above-mentioned Exceptions 9, 15, 16, 18 and 20 should be deemed waived and therefore disregarded.[9]

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[7]Section 102.46 (b)(1) of the Boards' Rules and Regulations requires that "each exception (i) shall set for specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge decision to which objection is made; (iii) shall designate by precise citation of page the portion of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exception document shall not contain any argument or citation of authority in support of the exception, but such matter shall be set forth in the brief. If no supporting brief is filed the exception document shall also included the citation of authorities and argument in support of the exceptions... "

[8] Pursuant to Section 102.46 (2) any exception to a ruling, finding, conclusion, or recommendation, which is not specifically urged, shall be deemed to have been waived. Any exception, which failed to comply with the foregoing, may be disregarded.

[9] In Pratt Towers Inc., and Lawrence Folkes and Keith Robinson and Local 32-B 32J Services Employer, 338 NLRB 61 (2002), the Board found that the employer's exceptions to certain findings by the ALJ fail to meet the minimum requirements of Section 102.46 (b) (2) of the Board's Rules and Regulations since the employer merely cites to the ALJ's

It is noted that as part of its efforts in attacking the ALJ's decision on grounds of his alleged failure to make specific findings, Respondent had argued in its Exception 16 that the ALJ erred by failing to make a finding that, in fact, was made by the ALJ. In that regard it is noted that contrary to Respondent's contention, the ALJ concluded that Senior Local 901 Officers, including Vazquez, were not in attendance at the second assembly. Therefore, Exception 16 should be dismissed as the ALJ, in fact, took into consideration Respondent's contention as part of his analysis to conclude that the October 20-22 strike was an unfair labor practice strike.

Finally, it is noted that Respondent has not excepted to the ALJ finding that the work stoppage of September 9 constituted concerted activity protected under the Act (ALJD 12). In the same manner, Respondent has failed to file exceptions concerning the ALJ's finding resolution that employees Arguinzoni, Ortiz or any other employee, including one named Edwin, did not engage in acts of violence or strike misconduct; (ALD 23 and 24) nor to the ALJ's finding that Respondent failed to establish an honest belief that employees Pedro Colon, Hector Sanchez, Juan Resto and Jan Rivera engaged in any act of sabotage (ALJD 22). Consequently, Respondent has waived any argument concerning those findings and should be precluded from presenting any further attack to such finding. Therefore, the ALJ's finding that the September 9 work stoppage constituted concerted activity protected under the Act, as well as the ALJ finding concerning the alleged acts of strike misconduct, are not properly before the Board and therefore the ALJ findings must be adopted. [10]

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decision and failed to allege with particularly on what grounds the purportedly erroneous finding should be overturned, thus in accordance with Section 102 .46(b) (2) the exceptions were disregarded. Also in Stamford Taxi Inc. 332 NLRB. 1372, 1376 (2000) the Board found that some of the employer's exception to the ALJ recommended remedy did not meet the minimum requirement of Section 102.46 (b) of the Board's Rules and Regulations because the employer merely cited to ALJ's decision and failed to allege either in its exceptions or its supporting brief the particular error it contend that the ALJ committed or on what grounds it believes ALJ remedy should be overturned, thus the employer's exceptions were also disregarded. See also Show Industries, 312 NLRB 447 (1993).

[10] In the absence of exception to certain of the ALJ findings, the issue presented under the ALJ resolutions and findings are not open to the Board review and must be adopted pro forma. Durman Transportation, Inc. 317 NLRB 785 (1995).

III. ISSUES

The Respondent's Supporting Brief purports to allege that the ALJ erred in the following findings and conclusions on the grounds that they are allegedly erroneous and/or contrary to the record, which are discussed in further detail below:

1. Respondent discharged Shop steward Miguel Colon in violation of Sections 8(a) (1) and (3).
2. The October 20-22 was a unfair labor practice strike.
3. The last chance agreement was unlawful because it requires relinquishment of Section 7 rights.
4. The discharge of four strikers, Luis Bermudez, Jose Rivera-Barreto, Virginio Correa and Luis Melendez violated Sections 8(a) (1) and (3).

IV. DISCUSSION OF RESPONDENT'S EXCEPTIONS

A. The Discharge of Shop Steward Miguel Colon

In its Exceptions 1 through 6, Respondent contends that the ALJ erred in finding that the discharge of Shop Steward Miguel Colon was in violation of Section 8(a) (1) and (3) of the Act. Contrary to Respondent's position, CGC contends that the record evidence as found by the ALJ correctly support the finding that Respondent Employer terminated the employment of Shop steward Miguel Colon in violation of Sections 8(a) (1) and (3) of the Act.

With regard to Respondent's contention that shop steward Miguel Colon unlawfully entered the Respondent's facilities on the night of September 9, the record evidence clearly demonstrated, as found by the ALJ, that Miguel Colon entered the facilities on September 9 pursuant to normal company practice and procedures, and that at no time was he denied access nor informed that he was not allowed to enter the facility that night. Contrary to Respondent's contention, Shop steward Miguel Colon testified that in the performance of his duties as shop steward he had no restrictions as to his entrance into the plant outside of his working hours (Tr. 241). Specifically, he testified that

he had entered the plant outside of his working hours to handle grievances, to conduct meetings with the unit members concerning matters such as medical plan enrollment or to discuss proposals, visits which were carried out during various work shifts (Tr. 242). Specifically as to September 9, shop steward Miguel Colon testified that he arrived that night at Respondent's plant around 8:40-8:45 pm. (Tr. 245). That when he arrived at the plant he stopped at the security guard booth, greeted the guard, gave his name and was allowed to enter as usual (Tr. 245). As corroborated by Respondent's own witness, Senior Human Resources Director's, Lourdes Ayala, that was the normal procedure required by Respondent to enter its facility. In this regard, it is noted that Ayala testified that according to Respondent's access procedures, any person, including employees, who entered the facility has to record his entrance with the security guards at the entrance booth, with name and the exact time that he entered the facility (Tr. 768).[11] Curiously, Respondent opted not to submit into evidence the security guard entrance log for September 9. The Board has long held that the failure to produce evidence in the possession of a party that may reasonably be assumed to be favorable to its position raises an adverse inference. Martin Luther King Sr. Nursing Center, 231 NLRB 15 fn. 1 (1977).

It is further noted that Respondent's own witnesses, Operation Director Carlos Triqueros admitted in his testimony that according to the alleged instructions provided by Ayala, the only person that was not authorized to enter the plant on September 9 was Union business agent Jose Adrian Lopez (Tr. 657). Lead Operator Victor Colon further admitted that according to the instructions he received, only Lopez was allegedly not allowed to enter the plant (Tr. 593) and that he did not receive instructions to prohibit the entry of any of the shop stewards to the plant that night (Tr. 593-594).

[11] Ayala further testified that only employees that are on leave or disciplinary suspension cannot enter the plant. In those cases the Respondent would provide a letter to the security guard with the name of such employees and the guards will not let them enter (Tr. 768).

Finally, it is necessary to mention that Respondent in its Brief in Support of the Exceptions, was not able to identify any evidence in the record and/or cite any legal authority in support of its contentions that Miguel Colon unlawfully entered Respondent's facility on September 9. This is so because during the trial Respondent failed to submit any evidence to establish that Miguel Colon was denied access or informed that he was not allowed to enter that night to the plant by the security guards. Therefore, the ALJ correctly found that the record evidence demonstrated that Miguel Colon's entrance to the plant was in accordance with Respondent's normal practice and procedures.

Although the Employer contends that the ALJ erred in finding that Shop steward Miguel Colon did not encourage other bargaining employees to abandon their work station during the September 9 work stoppage, the Respondent's only basis for such assertion is the testimony of Armando Troche, whose testimony the ALJ correctly discredited as to this specific issue (ALJD 14). Contrary to Respondent's contention that Troche's testimony is uncontroverted, CGC submits, as discussed below, that all witnesses, including Respondent's own witnesses contradicted the testimony of Troche in material facts. The Board's established policy is not to overrule an administrative judge's credibility resolutions unless the clear preponderance of all relevant evidence conveniences the Board that they are incorrect. Fantasia Fresh Juice Company, 339 NLRB No. 112 (2003); Diversified Case Company, 272 NLRB 1099, (1984); Standard Dry Wall Product, 91 NLRB 544 (1950). Respondent Employer has not met its burden of proof to establish by a preponderance of all relevant evidence that the ALJ credibility findings are incorrect.

CGC contends that the ALJ findings concerning Miguel Colon's participation in the work-stoppage are correct and are amply supported by record evidence, as all credible evidence demonstrated that Miguel Colon arrived at the plant some time after the employees had concertedly stopped working and had already gathered in the area known as "conventional area". In that regard

shop steward Miguel Colon testified that when he arrived at the entrance gate he observed that a police car was already parked in front of Respondent's facility (Tr. 245). It is noted that Respondent's main witness as to the work stoppage, Victor Colon, testified when the police arrived to the facility he went with two police officers to the conventional area where all the employees had gathered with Lopez (Tr. 595). Miguel Colon further testified that when he arrived at the facility he first went to the cafeteria were they were supposed to have met, but because nobody was there, he called one of the shop stewards who told him to go to the warehouse area, and when he arrived at the conventional area all the employees were already gathered there with Lopez (Tr. 245). More specifically, during cross examination Miguel Colon testified that during his walk from the cafeteria through the production area and the warehouse he did not encounter any employee and that all the production lines were stopped (Tr. 271). He further testified that when he arrived in the conventional area he asked Lopez what had happened, as he saw a police car in front of the entrance gate, to which Lopez replied that Victor Colon was trying to remove him from the company premises and that he was waiting for Trigueros to inquire whether or not the relationship between the Union and the Respondent had changed (Tr. 246). Miguel Colon testified that Victor Colon then arrived with two police officers who interviewed Lopez and, minutes later, Triqueros arrived and also spoke with Lopez (Tr. 246-247). Miguel Colon testified that neither Trigueros, Colon nor any other supervisor instructed him to leave the plant or made any comment concerning his presence (Tr. 247), and that his only participation during the work-stoppage was to observe the events that transpired after his arrival, which he described as the arrival of the police in the conventional area, the interview of Lopez by the two police officers, and a conversation between Lopez and Trigueros (Tr. 247).

The fact that Miguel Colon arrived after the employees had stopped working and were already gathered at the conventional area was corroborated by union business agent Lopez, (Tr. 204)

who testified that shop stewards Carlos Rivera and Miguel Colon were not present during the incident in the cafeteria nor present during the second incident with V. Colon which had prompted the work-stoppage. Lopez credibly testified that Miguel Colon arrived after the employees were already gathered in the conventional area and shortly before the police arrived (Tr. 209). Employee Alexis Hernandez corroborated Miguel Colon and Lopez' testimonies, as he declared that when he arrived to the conventional area and joined the work stoppage, he only saw shop stewards Felix Rivera, Francisco Marrero and Romian Serrano (Tr. 342). The ALJ finding to the effect that Miguel Colon arrived some time after the work stoppage started and did not encourage any employee to abandon their work is further supported by Respondent's own witness, Victor Colon, who testified that the only person he heard asking the employees to stop working was union business agent Jose Adrian Lopez. In that regard it is important to note that Victor Colon specifically testified that it was Lopez who asked the employees to stop working and meet with him in the conventional area. Victor Colon further admitted that while that was happening, Lopez was accompanied only by two shop stewards (Felix Rivera and Francisco Marrero) and that he did not hear either F. Rivera or F. Marrero requesting the employees to stop working. The uncontroverted evidence demonstrated that the police arrived at the facility after the employees had concertedly stopped working and were gathered in the conventional area. In this regard, it is noted that Victor Colon admitted that the police arrived at the facility at about 8:45 pm (Tr. 550) at a time when the employees were already gathered in the conventional area (Tr. 595).

Miguel Colon testified without contradiction and his testimony was corroborated by other witnesses including Jose Adrian Lopez and Alexis Hernandez and even Respondent's own witnesses Lourdes Ayala, Carlos Triqueroas and Victor Colon. Therefore, the ALJ correctly credited Miguel Colon testimony that on September 9, 2008, he entered to Respondent's facility according to normal company practice and procedures and that he arrived in the conventional area sometime after all the

employees had concertedly stopped working and that he remained in the area with the rest of the employees, none of whom were disciplined.

With regard to Respondent's exception as to the ALJ's finding concerning the credibility of Armando Troche, it should be noted that Mr. Troche's testimony was not only vague and evasive during crucial aspects of his testimony, but wholly unreliable and contradicted by Respondent's main witness, Operations Process Leader Victor Colon, as well as by CGC's witnesses Union Business Agent Jose A. Lopez Pacheco and Alexis Hernandez. It is noted that Respondent called Troche as a witness after its own witness Victor Colon testified that he did not hear any of the shop steward shouting to the employees to stop working.

Troche's contradictory testimony is amply evidenced by the record and is in clear conflict with the rest of the witnesses, including Respondent's main witness, Victor Colon, as to the work stoppage (Tr. 478-479). CGC contends that Victor Colon's and Troche's accounts of the events cannot coexist since they are irreconcilable, as evidenced by the contradictions between Troche's and Colon's testimonies. In this regard, it should be noted that Colon testified that when Lopez, Francisco Marrero and Felix Rivera were "circling around him", no other supervisor was present, and that only security guard Rafael Rodriguez was present (Tr. 596). If no supervisor was with Colon when he encountered Lopez and the two shops stewards, Troche, who is a supervisor, could not have been present, and therefore could not have heard what transpired there. Note that according to Colon, Lopez was accompanied only by shop stewards Francisco Marrero and Felix Rivera (Tr. 545), while Troche testified that Lopez was accompanied by Francisco Marrero, Carlos "Charlie" Rivera, and a group of approximately 15 employees (Tr. 871 & 895). Colon's testimony was corroborated by Union Representative Lopez, who also testified that he was with Felix Rivera, and Francisco Marrero (Tr. 118). Further, according to Troche, while he was with Victor Colon and the security guard, he saw Lopez, Francisco Marrero, Charlie Rivera other

employees approaching them, because all three (Charlie, Lopez and Francisco) were shouting to employees to stop work (Tr.871). Contradictorily, Colon testified that during the night of September 9 he did not see any shop steward asking employees to stop working (Tr. 594). Colon's recollection of the events was that after he (Colon) saw Lopez with Francisco and Felix walking through the hallway, he told Lopez that he had to leave the plant because he was not authorized, and that shortly thereafter, "the people that were working in the warehouse, the operators, had stopped operations to look at the show he was putting up at that moment... " (Tr. 545).

Additional evidence of contradictions between Troche and Victor Colon can be seen in Troche's testimony that after encountering Lopez and the shop stewards, Victor Colon asked him to grant him access to an area where he could call the police (Tr.873).[12] However, according to Victor Colon, when he found Troche, he had already called the police (Tr. 545); and, after encountering Lopez, Francisco Marrero and Felix Rivera, he went to his office (Tr. 548). Moreover, Troche testified that at some point, the other two stewards, Felix Rivera and Romian Serrano, joined Lopez, Francisco Marrero and Charlie Rivera (Tr. 876, 877). Most of what Troche testified he saw, he allegedly saw while Colon was with him (Tr. 869-877 & 899-902), which has been shown could not be true. Although Troche testified that he saw Miguel Colon arriving last and asking employees to stop working (Tr. 883). However, Colon testified that he first saw Romian Serrano, Charlie Rivera, and Miguel Colon at the conventional area where all the employees were assembled during the work stoppage around 9:10 p.m. to 9:30 p.m (Tr. 554-556).

Based on the above, CGC contends that Victor Colon's testimony is consistent with Lopez and Miguel Colon's testimonies, that while employees were heading to the conventional area Romian Serrano arrived and that Charlie Rivera and Miguel Colon arrived when employees were already gathered at the "conventional area" (Tr. 120). His testimony is also consistent with that of

employee Alexis Hernandez, who testified that when he arrived to the "conventional area", he only saw "Romian, Felix, Frankie and Jose Adrian" (not Charlie Rivera or Miguel Colon) and that no shop steward asked him to stop work (Tr. 342-343).

Although Respondent, in its attempt to attack the ALJ's credibility finding, is now arguing that Troche's affidavit makes reference to the presence of Miguel Colon; however, such reference is misplaced and, in any event, CGC contends that regardless of whether or not Troche made reference to Miguel Colon in his affidavit, said testimony remains contradictory. In that regard it is noted that while Troche testified that all employees had ceased work to leave for the conventional area and that only two supervisors, together with the auditors, remained working (Tr. 882), he claims he afterwards saw Miguel Colon arrive and that Colon then asked employees to stop working, who, under Troche's prior testimony, had already ceased to work (Tr. 883). Said contradiction is also reflected in his affidavit as paragraphs 10, 11 and 12 are inconsistent among them. (GC14)[13]

Troche testified in a less than candid manner, reflected a poor recollection and his testimony appeared to be tailored to make it appear that all five shop stewards were inside the plant since the beginning of the work stoppage, and actively promoted the same, in order to justify Respondent's disciplinary actions. Therefore, the ALJ correctly discredited Troche's testimony that he saw shop steward Miguel Colon asking other employees to stop working (ALJD page 14). It is acknowledged

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[12] It is further noted that Victor Colon testified that during the night of September 9, he made numerous phone calls using his cellular phone, including several phone calls to Trigueros and the security guards (Tr. 253)

[13] Troche's contradictory testimony is further evidenced by another statement in his affidavit, in which Troche alleges that on September 9 around 4:00 pm he received a phone call from Roberto Rivera, Director of the Distribution Center informing him that it was probable that Lopez would come to the plant but was not authorized, and allegedly instructed him that if Lopez arrived to tell him that he needed to make a formal requested in order to speak with the employees. (GC 14 paragraph 6) It is noted that the uncontroverted evidence in the record established that Lopez requested Ayala permission visit the plant around 5:00-5:30 p.m. after the bargaining meeting ended (Tr. 104, 243, 781, 782 and 821). Once again Troche's statement cannot be credited as Respondent witness Ayala testified that the first person she notified about Lopez' potential visit to the plant was Trigueros and that said phone call was between 7:00-8:00 pm (Tr. 787). Trigueroas testified that Ayala called him around 7:00 and after that he informed Victor Colon what Ayala told him and instructed him to make sure that security knew the instructions (Tr. 654). Once again Troche's testimony is in clear conflict with Respondent other witnesses Ayala, Triguero and Colon. In this regard it is noted that according to Troche he received instruction concerning Lopez intended visit more than one hour before Lopez made the request to Ayala and at least **3 hours before Ayala allegedly imparted the instructions.**

that the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Therefore, CGC contends that the ALJ's findings concerning Troche's credibility are supported by record evidence. Thus, exceptions 1 and 2 should be disregard under section 102.46 (b) (2) or, in the alternative, should be found not supported by the evidence in the record.

In any event, and as discussed in further detail in CGC's Brief in Support of its Exceptions, CGC contends that even assuming arguendo for purposes of analysis that Miguel Colon had encouraged employees to stop working, a proposition that the CGC emphatically denies as not supported in any manner by the evidence, such conduct did not violate Article 12 of the expired contract, as said clause constitutes a waiver of Section 7 rights, and did not survive the expiration of the contract. CGC further contends that said conduct neither violates Article 13, which specifically applies to Union business agents and not shop stewards.

Finally, with regard to Respondent's Exception 3 in which it contends that the ALJ erred in finding that Respondent conducted a superficial investigation of the events of September 9, it is noted that both Victor Colon and Troche admitted not having prepared any written report concerning any of the alleged incidents of that night (Tr. 586 and Tr. 893). Respondent also failed to submit any documentary or testimonial evidence to support a finding that an investigation of the conduct of each of the shop stewards was conducted. In that regard, it is noted that Ayala failed to provide any testimony as to the alleged investigation which she allegedly conducted (Tr. 848).[14] Rather, the uncontradicted evidence shows that Miguel Colon, together with the other four shop

[14] Ayala testified that the shop stewards were discharged for alleged infraction of company rules, however she did not remember the specific reasons for the discharge. After refreshing her recollection with a prior sworn statement Ayala merely recited several company rules however she failed to provide any specific testimony as to the Respondent's alleged investigation of the shop stewards alleged infractions of company rules, or to provide any evidence to establish that they in fact incurred in the alleged infraction. She further admitted not having any recollection that the shop stewards were interviewed (Tr. 848).

stewards, were summarily suspended the following morning as early as 5:00 am. (Tr. 247-248). In Embassy Vacation Resorts, 340 NLRB 846, 846(2003) the Board found that an employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the employer's motive was unlawful.[15] In addition, an adverse inference should be drawn by the fact that although Victor Colon testified that there were security cameras in the cafeteria and in the warehouse (the same areas in which most of the allege incidents of September 9 took place), Respondent failed to introduce such videos as evidence (Tr. 596-597). The Board has long held that the failure to produce evidence in the possession of a party that may reasonably be assumed to be favorable to its position raises an adverse inference. Martin Luther King Sr. Nursing Center, 231 NLRB 15 fn. 1 (1977).

As discussed above, contrary to Respondent's contention, the ALJ correctly concluded that Miguel Colon lawfully entered the plant on September 9 and that he did not encourage any employee to stop working or to abandon their work stations, nor did he engage in any misconduct which violated the company's rules of conduct. Therefore, CGC contends that the ALJ fully analyzed the evidence in the record and correctly discredited the testimony of Armando Troche concerning Miguel Colon's alleged participation in the work stoppage. Therefore, Respondent's Exceptions 1, 2, 3, 4, 5, and 6 should be dismissed.

B. The October 20-22 Unfair Labor Practice Strike

In its Exceptions 7 through 28, the Respondent, in essence, contends that the ALJ erred in finding that the October 2-22 strike was an unfair labor practice strike. In support of its contentions the Respondent alleges that the strike was an economic strike; that the shop stewards acted as a labor organization, and that the purpose of the strike was to undermine the Union as the exclusive bargaining representative and ultimately replace it. As discussed below, Respondent's contentions

[15] Failure to investigate the alleged conduct is " strong evidence of pretext" Golden State Foods, 340 NLRB 382 (2003)

lack merit, as the record evidence clearly demonstrated, as found by the ALJ, that the October 20-22 strike was an unfair labor practice strike. (ALJD 16)

1. Events Preceding the October 20 Strike

a. Strike Action was Suggested during a Union Meeting

On September 10, 2008, after Respondent Employer summarily suspended the five shop stewards, Lopez received instructions from German Vazquez, Union Treasurer/Secretary, to call an emergency meeting with the shop stewards at the Union offices (Tr. 129).

Vazquez met first with Lopez around 7:00 -7:15 am, and during that meeting Lopez narrated the incidents that took place during the prior night at the Respondent's facility. According to Lopez' uncontradicted testimony, Vazquez told him not to worry, that things had been done correctly the night before and that the issue of the bargaining committee members was going to be resolved. During that meeting, Vazquez, Jose Carreras, Attorney for the Union, and Luz Delia Perez, Organizing Director, were present (Tr. 130). That same day, around 10:00-10:30 am, Vazquez and Lopez met with the five shop stewards. During the meeting, Vazquez instructed Lopez and the five shop stewards to call a General Assembly with the unit employees for September 15, 2008. It was further discussed that the three points to present to the membership were the return of the negotiating committee to their working positions, that no charges would be filed against the Union, and to return to the negotiating table, meaning both Coca-Cola and the Union (Tr. 131).

Shop steward Miguel Colon testified that during another meeting subsequently called by Vazquez with the shop stewards, during which their employment status was again the subject of discussion, Attorney Carreras, counsel for the Union, told the shop stewards that the only way for them to return to work was by way of a strike (Tr. 289).

Hussmann Corp, 290 NLRB 1108 fn2 (1988)

Although Respondent is now arguing in its Exception 13 that the ALJ erred in finding that counsel for the Union suggested the used of a strike as the only vehicle to resolve the employment status of the shop stewards, under the ground that such finding is based on self serving testimony, it is noted that Miguel Colon testified without contradiction and was subject to cross examination by counsels for Respondent Employer and Respondent Union. In addition, and as admitted by the Respondent, Attorney Jose Carreras was present during the trial and was available to testify.[16] Notwithstanding the above, Respondent opted not to call Carreras as a witness even though Miguel Colon's testimony was not contradicted by any other witness. It is noted that Attorney Carreras was not a party allied with CGC, but rather one of the counsels for an adverse party and who would have qualified as a hostile witness if called to testify.[17] Respondent's argument is completely frivolous as it pretends to portrait that CGC was obligated to call a hostile witness in order to corroborate the testimony of a witness that was not controverted and/or impeached.[18] In any event, CGC contends that if an inference is to be drawn by not calling attorney Carreras it should be against Respondent. It is well-settled doctrine that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. In particular, it may be inferred that the witness, if called would have testified adversely to the party on that issue. Spring Aid Center, 311 NLRB 1151(1993); Pinkerton's Inc., 295 NLRB 538 (1989); International

[16] It is further noted that Attorney Jose Carreras was present at the hearing room during the trial and was not the leading attorney for Respondent Union. In that regard he was an available witness who could have been called by Respondent Employer.

[17] CGC submits that the transcript of the hearing reflects that during CGC presentation of its case in chief against the Respondent Employer, the Respondent Union vehemently objected to the introduction of documents favorable for the CGC and aggressively cross examined all of CGC's witnesses, but curiously abstaining from presenting any objection to the introduction of the Respondent Employer documentary evidence or from engaging in any cross examination of Respondent Employer's witnesses.

[18] Respondent Employer cannot have it both ways, as it opted not to call Attorney Carreras and therefore, now should be prevented from attacking the ALJ credibility finding under the argument that the uncontroverted testimony of Miguel Colon was self-serving.

Automated Machines, supra. Therefore, CGC submits that the ALJ's credibility finding is correct as supported by uncontroverted record evidence and Respondent Exception 13 should be dismissed.

2 The September 15 Assembly and Strike Vote called by the Union

Respondent's Exceptions 7 and 24, which alleges that the ALJ erred in finding that on September 15 approximately 130-160 employees authorized a strike to protest the suspension of the five shop stewards, has no basis in the record. Rather the record evidence fully supported the ALJ's findings as witnesses Lopez, Miguel Colon and Carlos Rivera-Rodriquez all testified that on September 15, 2008, an assembly called by the Union took place with the unit employees to resolve the suspension of the shop stewards, and a motion to approve a strike vote was presented to the employees which was unanimously approved. More specifically, the record reflects that the meeting took place in an empty lot of a furniture store known as Mueblerias Mendoza in the town of Cayey, and that about 130-150 unit employees attended the meeting. Present for the Respondent Union were German Vazquez, Union Secretary/Treasurer, Alexis Rodriquez, President, business agent Lopez and several union officials, including Jose Budet, Jose Luis Cortes, Angel Vazquez and Luz Delia Perez (Tr. 135 – 136). During that meeting, German Vazquez stated that the bargaining committee was going to have all the backup from the Union, and presented the unit members with the three points that the Union was to going to present to the Respondent as its conditions to resolve the situation: 1) the return/reinstatement of the five shop stewards, 2) the return to the bargaining table; and 3) that the company did not file charges against the Union. A motion for a strike vote was presented to the unit employees and the strike vote was approved unanimously (Tr. 137).

Miguel Colon corroborated Lopez' testimony to the effect that the Union called the General Assembly of September 15, that German Vazquez addressed the employees and told them that his conditions were the reinstatement of the shop stewards, the return to the bargaining table and that

no charges be filed against the Union. M. Colon further testified that a motion for a strike vote was presented to the unit members and approved unanimously (Tr. 249).

Employee Carlos Rivera-Rodriquez also testified as to what transpired during the Assembly of September 15. Rivera-Rodriquez corroborated that the assembly was called by the Union and Vazquez addressed the employees. That a motion was presented to approve a vote to strike in support of the reinstatement of the shop stewards to their jobs as well as to the bargaining table (Tr. 417). The strike vote was approved unanimously (Tr. 418). Employee Hector Sanchez corroborated the testimony of Lopez and Colon concerning this assembly and the strike vote[19] (Tr. 310).

Respondent is attempting to misrepresent the purpose of the September 15 General Assembly in that the unanimously approved strike vote was not to seek the reinstatement of the shop stewards. In its effort, Respondent is mischaracterizing a small portion of the testimony of the witness Miguel Colon to the effect that the strike vote was to be authorized only if Respondent Employer did not agree to at least one of the three issues.[20] CGC contends that said portion of Colon testimony cannot be taken in isolation, but rather in the context of the totality of the record testimony which amply demonstrated that the Union requested from its unit employees a strike vote to be implemented if the Respondent Employer did not agreed to the three conditions, including the immediate reinstatement of the shop stewards. Finding the contrary, as Respondent pretends, would absurdly imply that the employees were presented with three conditions for the approval of the strike vote, but that Respondent would have to agree only to one. In any event, the fact that the instructions to call the September 15 General Assembly came from German Vazquez, the highest Union official on September 10, the same day that the shop stewards were summarily suspended

[19] On direct examination Sanchez incorrectly stated that the assembly called by the Union in which the strike vote was approved unanimously took place during the month of October. During cross examination, however he clarified that said assembly took placed on September 15, 2008 (Tr. 332).

[20] CGC contends that Miguel Colon's testimony what intended to convey was that if the Respondent did not agree to at least with one of the conditions of the Union the strike was to be implemented.

negates such contention, and clearly reflects that the purposes of said assembly was to present the unit employees with a strike vote in order to resolve the employment status of the shop stewards. Consequently, the ALJ credibility finding is supported by record evidence and Respondent Exceptions 7 and 24 should be dismissed.

3. The October 12 Employee's Assembly and Petition to the Union for the Implementation of the Strike Vote.

As previously mentioned, the five shop stewards were summarily suspended on September 10, 2008 and that as of October 9 their employment status was still uncertain, so, the unit employees requested that the shop stewards conduct a meeting to talk about the situation.[21] Respondent Employer contends that the ALJ erred in finding that the October 12 meeting was called per the request of the unit employees; however, it failed to call any witness to controvert the testimony of Miguel Colon, who was subject to extended cross examination by both Counsel for the Respondent Employer and Respondent Union, testified, without contradiction, that the meeting was called at the request of the unit employees (Tr. 252-253). Therefore, the ALJ's credibility finding is supported by the uncontroverted testimony in the record, and the Respondent Employer has failed to cite any evidence in the record to establish that the ALJ's credibility finding is erroneous and/or incorrect; consequently, Exception 10 should be dismissed.

Respondent Employer, in its Exceptions 11 and 12, argued that the ALJ erred by failing to find that the meeting called by the shop stewards was intentionally scheduled to conflict with another meeting called by the Union, and that Union officer Angel Vazquez asked Miguel Colon on October 12 not to divide the membership. Respondent's first contention has no merits as is calling for a conclusion that is not supported by evidence in the record. With regard to the alleged

[21] Miguel Colon testified that the request for a meeting came from the unit employees (Tr. 253) It is undisputed that as of October 9, no other shop steward was appointed and therefore, the unit employees had worked for a complete month without representation of their shop stewards. Therefore, it seen more than reasonable that the unit employees in fact requested a meeting with the only shop stewards known to them.

statement by Angel Vazquez, it is noted that there is absolutely no evidence in the record that on October 12 Miguel Colon and Angel Vazquez had any conversation and therefore should be dismissed. If the Board, in its discretion, found that Exception 12 relates to October 9, CGC submits the Respondent's exception is a mischaracterization of the events that transpired on said date. In that regard Miguel Colon testified that on October 9, at about 7:00, he and the other four shop stewards arrived at the entrance of Respondent plant to distribute the flyer about the assembly. That at approximately 7:30 pm they started distributing the flyers to the unit employees as they exited Respondent's plant from their shifts (Tr. 273) in order to inform them that the assembly was going to take place on October 12 at the empty lot of Mueblerias Mendoza. M. Colon testified that some time after they arrived they learned that several officials of the Union were inside Respondent's plant, allegedly notifying the employees of a different meeting called by the Union also to be held on October 12.[22] In this regard, Miguel Colon specifically testified that it was not until 8:30 pm that they first learned that the Union was allegedly inside the plant announcing another meeting for that same date. The Respondent is now attempting to mischaracterize what transpired on October 9 and to portray that Respondent Union officers Angel Vazquez and Alexis Rodriquez allegedly requested, in an amicably manner, the shop stewards not divide the membership by calling a meeting for the same date that the Union was also calling a meeting. CGC contends that the events of October 9 cannot be examined in a vacuum, but rather in conjunction with other record evidence, including CG Ex. 1(a), GC Ex. 1(xxxxxx), GC Ex.1 (bbbbbbb), and ALJ EX 1(a). These exhibits reflect that on October 14, 2008, the Charging Party filed a charge in Case 24-CA-2648 specifically alleging that on October 9 the Union, through it officers, agents and representatives made threatening remarks and engaged in acts of violence

[22] The events that occurred during the distribution of the flyer relates to the allegation of violence from Respondent Union and display of weapons which was originally dismissed by the Region, and the dismissal was revoked by Division of Appeal and settled as part of the Informal Settlement Agreement in case 24-CB-2648 et al.

against the four shop stewards. Although on November 18, 2009, that portion of the charge was originally dismissed by the Region (GC Ex. 1 (xxxxxx)), the Charging Party on November 24, 2009, appealed the Regional Director's decision (GC Ex. 1 (bbbbbbb) and subsequently, on January 9, 2010 the Division of Appeal revoked the Regional Director's determination and found that the appeal was sustained with regard to the allegation that the Union, through its officer, agents and representatives made threatening remarks and engaged in acts of violence against Union members.[23] During its case in chief, CGC abstained from submitting evidence concerning the Union's acts of violence as this allegation was not included in the Complaint, and it was not until January 8 that the decision from the Office of Appeals issued. However, it should be noted that on January 11, 2010, CGC and Respondent Union with the approval of the ALJ, amended the Settlement Agreement executed on December 7, 2009, in order to include as part of said settlement the appropriate language concerning such acts of violence. See ALJ Ex 1 (a) Notice A in Cases 24-CB-2648, 24-CB-2673, 24-CB-2682 and 24-CB-2686. [24]

Finally, with regard to the October 12 meeting, the uncontroverted testimony reflected that the unit employees conducted an assembly in which a petition was signed requesting the Union to implement the strike vote of September 15 (Tr. 256). All five shop stewards were present and General shop steward Carlos Rivera spoke to the employees during that meeting and emphasized that the petition to implement the strike vote was consistent with the three points presented by the Union Secretary/Treasurer, German Vazquez to the unit employees during the assembly of September 15 (Tr. 254). All the employees present at the meeting signed the petition to implement the strike vote and on October 14 the petition was sent to the Union via fax; however, the Union

[23] CGC request that administrative notice be taken of the Office of Appeal decision issue on January 8, 2010 in case 24-CB-2648

[24] The Respondent Union and CGC reached an agreement with the approval of the ALJ settling said allegation as part of the present proceedings and, therefore, the corresponding language remedying said violation was included in the Notice to Employees and Members of the informal Settlement Agreement and Notice to Members already approved in Cases 24- CB-2648 et al, mentioned above (ALJ Ex 1(a)).

never replied to that correspondence (Tr. 256). (GC Ex. 29 (b)) Therefore, CGC contends that Respondent Exceptions 11, 12 and 14 should be dismissed as unsupported by the record evidence.

4. The October 13 Meeting - Respondent's Knowledge of an Impending Strike and Trigueros' Threatening Remarks

Respondent contends in Exception 17 that the ALJ erred by failing to find that during the October 13 meeting the Respondent allegedly informed its employees that it was willing to resume the collective bargaining agreement negotiations upon the Union requests. Contrary to Respondent's contention, the ALJ found that during the October 13 meeting Trigueros informed the employees that those who followed the discharge shop stewards would also be terminated (ALJD pages16 and 19).

CGC submits that the ALJ's credibility finding is fully supported by the uncontroverted testimony of Hector Sanchez and that Respondent's Exception 17 should be dismissed for lack merits. In that regard it is noted that in support of Exception 17, Respondent is relying only upon a mischaracterizing of Sanchez' testimony to the effect that Triqueros allegedly told the employees that the company was willing to continue negotiations of the contract. CGC contends that Respondent is trying to mislead the Board by taking out of context the testimony of said witness and avers that Sanchez' testimony demonstrated that since at least October 13 the Respondent knew that the employees were considering going on strike in order to protest the discharge of the shop stewards, and that the October 13 meeting was called by Respondent in order to discourage the unit employees from engaging in such strike by means of threats. In that regard, it is noted that witness Hector Sanchez testified that on October 13 he attended a meeting called by Carlos Trigueros with the unit employees from the first shift at which supervisors Victor Colon and Enrique Dalmau were also present. Sanchez testified that Trigueros told the employees that those who would follow the five shop stewards that were terminated would end up being dismissed also. According to Sanchez, Trigueros also stated that the company had enough money to pay them, so that they would not be

able to enter again to the Cayey plant (Tr. 312,) and that if the employees did go on strike, they would end up dismissed just as the shop stewards had been (Tr. 333).

Sanchez' testimony is uncontroverted as the Respondent failed to call any witness to controvert Sanchez' testimony. Furthermore, it is noted that although Trigueros was called as a witness by Respondent Employer and amply testified with regard to the September 9 work stoppage and the October 20 strike, he failed to testify about the October 13 meeting, or deny Sanchez' testimony concerning his statements during the October 13 meeting.[25] Therefore, the ALJ's credibility finding that during the October 13 meeting in which Trigueros informed the employees that those who followed the discharge shop stewards would also be terminated (ALJD pages16 and19) is amply supported by uncontroverted evidence in the record.

The Respondent's mischaracterization of Sanchez' testimony is evident in that what Sanchez testified was that Trigueros told the employees that the company was willing to continue negotiations of the contract, but without the shop stewards (Tr. 313). CGC contends that Respondent has taken Sanchez' testimony out of context in order to make it appear that in the October 13 meeting Respondent allegedly notified the employees that the negotiations between Respondent and the Union were about to resume. Contrary to Respondent's contention, Sanchez' testimony negated the Respondent's allegation that the Union and Respondent were about to resume negotiations, but rather demonstrated that the Respondent had established as a condition to return to the bargaining table that the Union continue the negotiations of the successor contract without the five shop stewards as its bargaining committee. In addition, CGC submits that Sanchez's testimony clearly demonstrated that Trigueros' statements were not only coercive in nature but, in

[25] In addition, it is noted that Victor Colon, who according to Sanchez' testimony was present during the October 13 meeting was called by Respondent as witness but failed to testify about the October 13 meeting.

fact, constituted clear threats of reprisals.[26] Trigueros' statement "that the company had enough money to pay them so that they would not be able to enter again the Cayey plant" (Tr. 312) further negates Respondent's contentions that the Respondent Employer and Respondent Union were allegedly working toward the resolution of the disciplinary actions against the shop steward. This statement unequivocally conveyed the message to the employees that the shop stewards were not going to return to work at the plant and that Respondent was willing and able to use its unlimited economic resources in order to prevent the reinstatement of the shop stewards. Consequently, CGC contends that Respondent Exception 17 should be dismissed as not supported by the record.

In its Exceptions 18 and 19 Respondent contends that the ALJ erred by failing to make a finding to the effect that on October 15 the Union requested Respondent to resume negotiations and that as October 16 the unit employees knew that the Respondent and the Union were about to resume negotiations. Contrary to Respondent's contention, CGC avers that there is no evidence in the record to support such finding, but rather Respondent's own witness employee Micael Resto testified to the contrary.

Although Respondent Employer is now attempting to portray that it kept the employees appraised of its communications with the Union, Micael Resto, who was called by Respondent as its witness, admitted that Joint Exhibits 13, 14, 15, and 17, which allegedly were communications exchanged between the Respondent Union and Respondent Employer prior to the strike, were not posted in the company's bulletin boards until the Thursday after the strike started (October 23) (Tr. 1013). It is noted that the strike started on October 20 and lasted until the late morning hours of October 22. Therefore, Respondent's own witness, Micael Resto, admitted that, in fact, he first saw and learned about the alleged communications between Respondent Employer and

[26] In its decision the ALJ did not included these statements as a violation as they were settled as part of the Settlement Agreement in Cases 24-CA-11189, 24-CA-11193 and 24-CA-11194. See ALJ Ex 2.

Respondent Union after the strike had ended. Consequently, as stated before Exceptions 18 and 19 lack merit and should be dismissed as not supported by record evidence.

5. The October 20 Strike and its Purposes

In its Exceptions 22 through 28, the Respondent Employer is in essence attacking the ALJ's finding that the October 20-22 was an unfair labor practice strike. Firstly, the Respondent is attempting to mislead the Board by arguing that the October 20-22 was not an unfair labor practice strike, but rather an economic strike. The Respondent's only argument in support of said contention is that in the Union's Request for Strike Assistance Funds there is a reference to the negotiations of the economic articles of a successor contract. CGC contends that such reference is misplaced and taken out of context, as the record evidence clearly demonstrated that as of September 9, which was the last bargaining session prior to the date of the filing of the Request for Funds, Respondent Employer and Respondent Union were still bargaining the non-economic articles and the negotiation of the economic articles have not yet started (Tr. 96 and Tr. 103). In addition, the fact that the Request for Strike Assistance Funds was prepared and signed by Vazquez on September 16, the day after the employees unanimously approved the strike vote during the General Assembly called by the Union and less than one week from the last bargaining session, negates Respondent's contention that the Request for Approval of Strike Benefits was done because of a stalemate in the negotiations of the economic articles of the successor contract.

CGC submits that there is absolutely no evidence in the record to support Respondent's contention that the October 22 was an economic strike. Rather, the overwhelming evidence in the record clearly reflects that the October strike was to protest the suspension and termination of the shop stewards, including that of Miguel Colon, which, as the ALJ found, was in violation of Sections 8(a) (1) and (3).

It that regard, it is noted that the undisputed record evidence demonstrated that on October 20, a majority of the unit employees went on strike. According to M. Colon, the picket line was organized in front of Respondent's facility and on the first day approximately 109 employees participated in the strike (Tr. 258-259). Some of the picket signs read "illegal practices and/or unlawful practices", and another sign read "Victor Colon mad dog", in clear reference to the acts of Victor Colon during the September 9 work stoppage. Miguel Colon testified that every time that any of Respondent's managerial personnel, such as its President, Roger Tovar, Trigueros, or Counsel for Respondent, Attorney Maza, entered or exited the facility, he and other employees stated through the loud speakers that the purpose of the strike was to request the reinstatement of the shop stewards who had been unfairly discharged and to continue with the negotiations of the CBA (Tr. 258-259).

Hector Sanchez corroborated the testimony of Miguel Colon as he testified that on October 20 the strike started around 10:00 am; that the employees were gathered outside the Company's gates, and that they were walking in circles and the employees were asking the Company to reinstate the five shop stewards back to their employment positions (Tr. 307). He also corroborated that Miguel Colon was using the loud speakers during the strike and that he was also requesting the reinstatement of the shop-stewards to their jobs (Tr. 307). As to the reason why he went on strike, Sanchez testified that he went on strike to protest the termination of the shop stewards because of his belief that their discharge was unfair (Tr. 334). Alexis Hernandez also testified that on October 20 he joined the strike and that the purpose of the strike was to request the reinstatement of the shop stewards (Tr. 349).

Employee Rivera-Rodriquez corroborated that Miguel Colon, as well as other employees, including himself, spoke by loudspeaker and were requesting that the Respondent reinstate the shop stewards and members of the bargaining committee to their jobs and to the bargaining table and to

resume CBA negotiations (Tr. 419). Although during cross examination the Respondent Employer attempted to mischaracterize his testimony so that it would appear that the request for the continuance of the negotiations was with another union or with the shop stewards by themselves, Rivera Rodriquez undisputedly testified that the request was for the continuation of the negotiations with the Respondent Union (Union de Tronquistas) (Tr. 427). Consequently, the record evidence amply supports the ALJ's finding that on October 20 the majority of unit employees went on strike to protest the discharge of the five shop stewards, including that of Miguel Colon.

In Golden Stevedoring Co., 335 NLRB 410 (2001) the Board stated: It is well established that a work stoppage is considered an unfair labor practice strike if it is motivated, at least in part, by the employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. It is not sufficient, however, merely to show that the unfair labor practice preceded the strike. Rather, there must be a causal connection between the two events.

In determining whether a causal connection between the strike and the preceding unfair labor practice exists, the Board looks to the "state of mind of the strikers" and their motivation. C-Line Express, 292 NLRB 638, 639 (1989). When it is reasonable to infer from the record that an employer's unlawful conduct played a part in the decision of employees to strike, the strike is an unfair labor practice strike. Even in the absence of direct evidence, a casual connection between the respondent's unlawful conduct and the strike may be inferred from the record as a whole. Child Development Council, 316 NLRB 1145 (1995). As long as an unfair labor practice has "anything to do with" causing a strike, it will be considered an unfair labor practice strike. NLRB v. Cast Optics Corp., 458 F. 2d 398, 407 (3rd Cir. 1972), cert. denied 419 U.S. 850 (1972). The burden is on the employer to show that the strike would have occurred even if it had not committed the unfair labor practices. Larand Leisurelies, Inc. v. NLRB, 523 F. 2d 814, 820 (6th Cir. 1975) General Counsel

must prove that the employer's unfair labor practices were casually related to either the employees' decision to strike or to remain on strike to establish their status as unfair labor practice strikers. C-Line Express, 292 NLRB 638 (1989) Post Tension of Nevada, Inc. 353 NLRB No. 87, at n. 2 and slip op. pages 10-11 (January 30, 2009). While substantial weight may be given to the strikers' characterization of their motives, the Board must be wary of self-serving rhetoric which is inconsistent with the factual context of the strike. Soule Glass Co. v NLRB 652 F 2d 1055, 1080 (1st Cir. 1980). Conversely, a casual connection between a strike and an employer's unfair labor practice may be inferred even without testimony from the strikers citing the unfair labor practices as motivating their strike.[27]

The uncontradicted testimony of employees Miguel Colon, Rivera Rosario, and Alexis Hernandez clearly demonstrated that the employees voted to go on strike to protest the unlawful discharge of the five shop stewards (and members of the union bargaining committee) and that on October 20, when the employees went on strike, it was to protest the unlawful discharge of the shop stewards and to request their reinstatement. Several employees, including M. Colon and Jose Rivera, used the loudspeakers to inform the Respondent that the purpose of the strike was to protest the unlawful discharges and to request the reinstatement of the five shop stewards. Employees also testified that they carried signs which read "Unfair labor practices" As noted in International Protective Services, Inc. 339 NLRB 701 (2003), the general rule under the Act is that employees have the right to strike for the purpose of mutual aid and protection. Moreover, as stated in that case, citing NLRB v. Erie Resitor Corp. 373 U.S. 221 (1963), the Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice. The Board has long held that employee protests regarding employee discipline are protected even if the discipline was lawful. Pepsi Cola Bottling of Miami Inc., 186 NLRB 477 (1970) It is unlawful to discharge

[27] Child Development Council, supra.

employees for engaging in a lawful strike or for refusing to cross a lawful picket line. Abilities and Goodwill Inc., 241 NLRB 27 (1997); Bio Medical Applications Of New Orleans, Inc., 247 NLRB 973 (1980); B.N. Beard Co., 248 NLRB 198 (1980). Furthermore, the Board has held that a strike or work stoppage to protest the discharge of fellow employees, whether those discharges were justified or unjustified, is a concerted activity protected by Section 7 of the Act. See Summit Mining Corporation, 119 NLRB 1668, 1672-73 (1958), and authorities there cited. Auto-Truck Federal Credit Union, 232 NLRB 1024, (1977), Associated Cleaning Consultants, 226 NLRB 1066, (1976), and Roemer Industries, Inc., 205 NLRB 63, (1973).

In the present case, the evidence clearly demonstrated that the purpose of the October 20 strike was to protest the discharge of the five shop stewards. Therefore, GCG submits that the record amply supports the ALJ's finding that the October 20 strike constituted an "unfair labor practice" strike. Thus, Respondent's contention that the strike was unprotected is without merit.

Respondent's contentions that shop stewards acted as a labor organization within the meaning of the Act and the purposed of the strike was to force Respondent to recognize and bargain with them in derogation of the Union are meritless as unsupported by record evidence.

Contrary to Respondent's contentions, the October 20 strike was not unprotected since the employees did not act in derogation of any stated Union objective and they did not seek to bypass the Union. With regard to the strike being in derogation of the Union as the exclusive representative of the employees, the evidence, contrary to Respondent's contention, shows that on September 15, the Union requested a strike vote to be implemented in the event that Respondent refused to reinstate the shop stewards. The record, as found by the ALJ, further demonstrated that counsel for the Union advised the shop stewards that the only way to get them back to work was through a

strike.[28] Furthermore, on October 12 the employees requested in writing to the Union that the strike vote be implemented and on October 14 the petition was faxed it to the Union. In their petition the employees enumerated the three items presented by Vazquez, the Union Secretary/Treasurer during the September 15 General Assembly for the strike vote (CG Ex 29 (b). The Union failed to reply to the employees or to otherwise inform them that it no longer supported a strike or had changed its position. Therefore, Respondent has failed to demonstrate that the October 20 strike was in derogation of the Union's position.

With regard to Respondent's allegation that the strike had the purpose of forcing the Respondent to bargain directly with the shop steward as exclusive representatives of the unit employees, or that the shop stewards acted as a labor organization, there is absolutely no evidence in the record of such alleged purpose. There is no evidence either that the purpose of the strike was to replace the Union by the shop stewards. The Respondent's only argument is based on piecemeal testimony that shop steward Miguel Colon asked the Respondent to bargain. CGC submits that such statement has be taken out of context and, in any event, does not by itself equate to a request for recognition, nor is it in derogation of the Union as the employees exclusive bargaining representative. As mentioned above, although during the trial Respondent attempted to mischaracterize witness Rivera Rodriquez' testimony, he undisputedly testified that what the strikers requested was for the continuation of the negotiations with the Respondent Union (Union de Tronquistas) (Tr. 427).

The fact that the shop stewards, as well as the employees were expressing their request for the reinstatement of the shop stewards and were asking Respondent to discuss the matter does not change the purpose of the strike into one for recognition of a labor organization in the absence of

[28] The remarks of the Union's attorney not only conveyed the message that the Union was supporting a strike, but also that the strike was the only available alternative for the Union. This remark further supports CGC's contention that there was no CBA in effect, and therefore, no feasible means to arbitrate the discharge of the shop stewards.

any demand for such recognition. In the present case, the Respondent failed to present any evidence to show that during the strike any of the shop stewards ever addressed the Respondent with an intention of gaining its recognition, nor to replace the Respondent Union. Contrarily, the uncontradicted testimony of Rivera-Rodriquez demonstrated that at all times the employees were referring to the continuance of the negotiations with the Respondent Union.

In Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), the Court recognized that a union, as the exclusive representative of the employees in dealing with the employer has a legitimate interest in speaking with one voice and "in not seeing its strength dissipate and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interest."[29] In accordance with this principle, otherwise protected activity may lose the protection of the Act if it seeks to usurp or replace the certified bargaining representative or otherwise is taken in opposition to the union's position. On the other hand, when the employees' action is more nearly in support of the things in which the union is trying to accomplish, the activity will be protected. In Architectural Research Corp., 267 NLRB 996, 996 n. 2, 1005 (1983), the Board found that the conduct of the employees when they sought a second break period was protected, where the union was seeking to negotiate with the employer over the reinstatement of the second break, even though that the union had previously agreed to the elimination of said break. Also, in East Chicago Rehabilitation Center, Inc., 259 NLRB 996, n. 2 1000 (1982), where the Board found that the employees' spontaneous walkout to protest a unilateral change in the lunchtime practice was protected activity in view that the union had also protested the change.

[29] Emporium Capwel, supra, at 70. The Court found that a minority group of employees were not engaged in protected activity when they attempted to bargaining directly with the employer terms and conditions of employment based on racial discrimination.

It is well established that a concerted work stoppage by employees is protected under Section 7 of the Act, unless it has an improper objective or is conducted in an improper manner.[30] Contrary to Respondent's contention, and, as discussed above, there is no evidence that the employees went on strike for economic considerations or any other motivating factor. Therefore Exceptions 22 through 28 should be dismissed

C. The Unlawful Discharge and Suspension of the Strikers

As discussed above, the record evidence clearly supports the ALJ's finding that the October 20 strike was an unfair labor practice strike. According to well settled Board law, strikers who have been engaged in unfair labor practice strike are entitled to reinstatement. Grinnell Fire Protection Systems Co., 335 NLRB 473, 475 (2001).

Notwithstanding the above, during the late night hours of October 22 the strike came to an end, and on October 23 all the strikers attempted to return to work, but Respondent refused to allow them to return to work. That same day, the Respondent issued a termination letter to the 34 strikers alleged in the Complaint. Also on October 23, Respondent issued a suspension letter to 52 strikers, among them, Luis Bermudez, Jose Rivera-Barreto, Virginio Correa and Luis Melendez, in which it informed them that they were suspended for a period of 15 days until an investigation be conducted and a final discipline determined. Bermudez, Rivera-Barreto, Correa and Melendez were reinstated pursuant to the last chance agreement after completing the suspension period imposed on them, and subsequently, they were terminated for allegedly violating the terms of the agreement, which as found by the ALJ was unlawful by its own terms.

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[30] The Supreme Court in N.L.R.B. v. Washington Aluminum Company, Inc., 370 U.S. 9 (1962), approved the concept enunciated by the Board, which established that employees who spontaneously ceased work after reporting to their job because of unsatisfactory work conditions in the plant were entitled to the Act's protection, notwithstanding that the stoppage occurred without advance notice to the Employer or a prior demand for a change in the offending working conditions.

D Last Chance Agreement and Discharge of Employees Bermudez, Rivera-Barreto, Correa and Melendez

In its Exceptions 29 through 32 Respondent is in essence attacking the ALJ's finding concerning the "last chance" agreement and the discharge of four of the strikers who were discharged pursuant to the last change agreement.

As admitted by Respondent[31], on October 23, 2008, the Respondent issued a 15-day suspension letter to employees Luis Bermudez, Jose Rivera-Barreto, Virginio Correa and Luis Melendez for participating in the October 20 to 22, 2008 strike (JX-6). On October 30, 2008, the Respondent met with employees Bermudez, Rivera-Barreto, Correa and Melendez during which they were informed that due to their participation in the afore-mentioned strike, they would be suspended for 30 days, rather than the 15 days as provided in their October 23 letter (JX-7).

The "last chance" agreement provides in pertinent parts that:

> "1. During the days from October 20 to 22, 2008, several employees, instigated by some ex-employees and non-company personnel conducted an illegal strike which required the police and tactic forces presence. In addition, act of sabotage and other acts of violence took place. The employee participated in said illegal strike.
>
> 4.(b) The [Respondent] agrees to reinstate the employee once the sanction be satisfied and immediately after the signature of the present agreement, as long as the employee will agree not to file any action and/or grievance against the [Respondent] or the Union because of the facts upon which his suspension was based, including but not limited to any violation to the right to strike, organization, association, or any other disposition related with Section 301 of the Labor Management Relations Act or any local law and/or for violation to the duty of fair union representation, back-pay and/or violation of the collective bargaining agreement.
>
> 4. (c) In consideration to the immediate reinstatement of the Employees, he/she expressly agrees with the Company that he, his spouse, his children, relatives, people who are close and/or related to him, do not have no will a establish any claim against the company or Union, or will in any way help instituting of processing said claim, suit or action that may arise or in any way be connected to his/her employment relationship with the Company or his her suspension
>
> 4. (d) The potential causes of action the Employee is expressly waiving and from which he completely releases the company include, but are not limited to, any claim

[31] Facts are admitted by Respondent in its Answer to Complaint and its affirmative defenses stated therein.

he might have, or might have had in the past, known or not, alleged or not alleged, brought up to a forum or not, because of or in retaliation to unjustified termination (Law 80 of May 30, 1976), violation of contract, loss of income; any claim for salary and/or benefit of any type under the 1938 Fair Labor Standards Act., Law 180 of July 27, 1988) amended , Law 379 of May 15, 1948 as amended, law 148 of June 30 of 1969, amended; damages of any kind, be they claimed under a theory of contract or under a theory of damages, such as injury to reputation and/or mental anguish, reprisal, sexual discrimination, being a victim or the perception of being a victim of domestic violence, marriage, maternity, religion, race, age, political ideas, political affiliation, social origin condition, national origin, any type of handicap, or any other reason forbidden by the Age Discrimination in Employment Act; Older Workers benefit Act; Title VII of the federal Civil Rights Act of 1964, Federal Civil Rights Act of 1991, Law 100 of June 30, 1959, as amended; Law 69 of July 1985, Law 17 of pairl 22, 1988, federal rehabilitation Act of 1973, Americans with Disability Act; Uniformed Services Employment and Reemployment Rights Act of 1994; Employee Retirement Income security Act of 1975, WARN; COBRA, Family and Medical Leave Act, Law for the Compensation of Accidents in the Workplace, Insurance for Non-Occupational Disability and any other statutory license, the Insurance Code of Puerto Rico or to any other law directly or indirectly related to your employment with the company or with your suspension.

7. The employee agrees not to testify or provide evidence against [Respondent] or the Union in any Court of law, administrative agency or hearing, or in any local or federal forum, excepts when the employee is subpoenaed or ordered to do so by a Court of law or competent authority.

11. The Employee accepts and acknowledges that this is the last opportunity the [Respondent] is granting him/her to keep his/her job, and that in the case he/she once again incurs in any behavior that violates the rules and/or regulations of [Respondent], he/she shall be terminated.

13. In case the Employee violates any of the provisions herein, he/she shall be terminated immediately." [emphasis supplied][32]

As noted above, the "last chance" agreement provides that upon signing the agreement the employees would be reinstated to work after completing the 30-day suspension (JX-7). Consequently, these four employees, along with approximately 44 other employees, were required to sign Respondent's "last chance" agreement if they wanted to return to work. The "last chance" agreement further stipulates that if the employees were to violate said agreement, the Respondent

[32] Although the ALJ did no rely in some of these paragraphs, Counsel for General Counsel contents that the Board is not preclude to consider the totality of the language of the last chance agreement.

would immediately terminate them. Thus, by signing said agreement, the Respondent conditioned their future employment on complying with the provisions found therein.

As reflected in its affirmative defense #78 of its Answer to the Complaint, Employees Luis Bermudez, Jose Rivera-Barreto, Virginio Correa and Luis Melendez were all fired by Respondent for not complying with the "last chance" agreement.[33] Although Respondent did not proffer any documental evidence or testimony regarding the reasons for their discharges, it claimed in its affirmative defense #76 that said employees had "... engaged in conduct violative of [Respondent's] rules." Respondent's further raised in its affirmative defense #77 that the four discharged employees "... violated the terms and conditions of the signed 'last chance' agreement."

a. Respondent's "Last chance" agreement is unlawful

The above referenced language of the "last chance" agreement requires that the employees relinquish certain rights, including their right to file unfair labor practice charges or to voluntarily give testimony to the National Labor Relations Board. Furthermore, the agreement's text is broad enough to be understood as precluding employees from exercising Section 7 rights to try to resolve employment disputes or grievances through the agency of a union, or through a disputes-resolution procedure established by collective-bargaining. Thus, the terms of the "last chance" agreement is designed to discourage employees from engaging in concerted activities and filing charges or giving testimony under the Act.

Under Section 8(a)(4), it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The Board's approach to Section 8(a)(4) of the Act "has been a liberal one in order to fully effectuate the section's remedial purpose." General Services, 229 NLRB 940, 941 (1977),

[33] Respondent admitted in its Answer that Bermudez was fired on November 6, 2008; Rivera-Barreto was fired on November 13, 2008; Correa was fired on December 10, 2008; and Melendez was fired on January 9, 2009.

relying on NLRB v. Scrivener, 405 U.S. 117, 124 (1972). Section 8(a)(4) is an essential aspect of the statutory scheme which is designed to "safeguard the integrity of the Board's processes. Filmation Associates, 227 NLRB 1721 (1977) (it provides a "fundamental guarantee" to those invoking the procedures of the Act; and the duty to preserve Board's process from abuse is a function of the Board and may not be delegated to the parties or an arbitrator). Mindful of these principles and practical concerns, the Board and courts have found that Section 8(a)(4) is not limited to protecting an employee who has filed charges or given testimony. Iberia Road Markings Corp., 353 NLRB No. 101 (2009). These same principles also apply to agreements that condition employment upon the waiver of Section 7 rights such as the afore-mentioned "last chance" agreement.

The Board has regularly held that the conditioning of employment upon the waiver of Section 7 rights or upon the abandonment of a grievance violates Section 8(a)(1) of the Act. Resco Products, Inc. 331 NRLB 1546 (2000); Prince Trucking Co., 283 NLRB 806, 807 (1987); Kolman/Athey Division of Athey Products Corporation, 303 NLRB 92 (1991); Kinder-Care Learning Centers, 299 NLRB 1171 (1990); Lakes Chemical, Corp., 298 NLRB 615, 622 (1990). It also negates the validity of any "waiver" resulting from such coercion. Clemson Bros., 290 NLRB 944, 951 (1988). In Retlaw Broadcasting Co., 310 NLRB No. 160 (1993), the Board found that the employer violated Section 8(a)(1) of the Act by offering to rehire an employee only on condition that he waive his right to file a grievance or seek union assistance regarding any future termination of employment. The Board reasoned that an employer cannot condition continued employment to an unlawful condition (abandoning union representation), even if it had previously made a legitimate decision to discharge the employee but that had not yet been effectuated. See also Ishikawa Gasket America, Inc., 337 NLRB 175 (2001) (separation agreement found overly broad and unlawful because it forced employee to prospectively waive her Section 7 rights).

The mere fact that that Respondent required its employees to sign the afore-mentioned "last chance" agreement, it clearly violated Section 8(a)(1) of the Act. Moreover, by conditioning their employment as provided in said agreement, Respondent also violated Section 8(a)(4) of the Act. Robin Transp., 310 NLRB 411 (1993). In Great Lakes Chemical Corp., 298 NLRB 615, 622 (1990), enfd 967 F.2d 624 (D.C. Cir. 1992), the Board found a Section 8(a)(4) violation, as well as a Section 8(a)(1) violation, where employees were required to sign statements waiving their rights to bring any legal action against the employer as a result of a layoff or termination. In the present case, the Respondent demanded that its employees sign the "last chance" agreement, which conditioned their employment to not filing unfair labor practices charges, among others, as a direct result of their participation in the October 20-21 strike.

Finally, even though Respondent contends that the Union negotiated and collaborated in drafting the "last chance" agreement, the Board would still find that Respondent violated the employee's Section 7 rights. Sycon Corp., 258 NLRB 1159 (1981). Moreover, the Board has held that if an employer were to participate in a union's arbitrary action against an employee, the employer himself violates Section 8(a)(1) and (3) of the Act. Sycon Corp. citing Miranda Fuel Company, 140 NLRB 181 (1962). The Board has held that if an employer accedes to a union's unlawful demands, although unwillingly, the employer discriminates against the affected employees in violation of Section 8(a)(1) and (3) of the Act. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, 149 NLRB 482 (1964).

In support of its argument that the last chance agreement is not overly broad, and therefore lawful, Respondent is relying on the following three cases:[34] US Postal Services, 234 NLRB 820 (1978); Coca Cola Bottling LA, 243 NLRB 501 (1979) and First National Supermarkets, Inc., 302

[34] Respondent Employer is also citing Transit Management of South Louisinana, 1995 NLRB Lexis 969 (1995); however, said case is an ALJ decision that never went to the Board. In any event, the cases cited by the ALJ in support of his decision are discussed below.

NLRB 727 (1991). CGC contends that said cases are distinguishable from our case. In US Postal Services, supra, the Board specifically stated that the complaint in said case did not allege that the employee engaged in protected concerted activities or filed charges before the Board and that the reduction of the discipline was conditioned only on Delph's promise not to grieve or appeal the suspension. In that case the Board, referring to the agreement, specifically stated: "there was no requirement that he (Delph) refrain from filing charges with the Board or that he refrain from engaging in protected concerted activities. It was, in short, simply an agreement to settle a dispute between Respondent and Delph and did not extend to apply to any right to grieve other matters which might arise in the future."

Also in Coca Cola Bottling LA, supra, the Board noted that the settlement agreement was limited to a specific suspension, and it does not prohibit the employee (Estrada) from filing labor practice charges concerning future incidents or preclude him from engaging in protected concerted activities. Contrary to the circumstance in Coca Cola Bottling LA, supra, where the settlement at issue involved the resolution of a disciplinary action for fraudulent acts, the discipline to the employees in our case, as alleged in the Complaint, was for their participation in an unfair labor practice strike.

In the above two cases, the Board was presented with agreements in which the language was completely different to our case, which, among other conditions, the Respondent required the employees to incorrectly admit that they engaged in an illegal strike, in which alleged acts of sabotage and violence took place, and required the employees to admit that they had engaged in such illegal acts, which as found by the ALJ, the Respondent had no honest belief that in fact occurred. These conditions in the language of the last change agreement are indisputably coercive in nature and directed to dissuade employees from engaging in any future lawful concerted activities. In addition, the agreement requires the employees to waive their rights to voluntarily testify or provide evidence

to the Board or any court of law. It is noted that the language used in paragraph 7 of the last chance agreement contains no limitation in time, nor does it specifically refer that such conditions are to apply only to the circumstances of their suspension. Ambiguities in the language of a release should be resolved against the party drafting such language.[35]

Finally, in support of its contention that the last chance agreement is not overly broad, Respondent is relying on First National Supermarkets, Inc., supra, a case in which the ALJ found that the release at issue was unlawfully overbroad and in violation of the Act, but the Board reversed the ALJ under the grounds that the reference in the release to the phrase "total employment" in the context of the release itself referred only to the date of the discharge. In reaching said conclusion the Board stated "we therefore construe the phrase "total employment" narrowly and find that it is limited to Hoope's past employment with respondent until his discharge in January 1998. CGC contends that First National is distinguishable. In the present case, the language used by the Respondent in the last chance agreement makes references to the phrase "your employment with the company" in paragraphs 4(c) and 4(d). Contrary to the circumstances in First National, supra, which involves a discharge, the last chance agreement in this present case relates to a temporary suspension in which the release was required to be signed as condition to return to work, and therefore, there is a presumption that the employment is to continue indefinitely. More over, and as mentioned above, in the present case the last chance agreement requires that the employees agree that any future violation of the agreement, company rules or clauses of the collective bargaining agreement would result in immediate termination. In that regard the reference in the last chance agreement to "your employment with the company" cannot be construed as in First National to refer to causes of actions preceding a discharge/termination, which puts to an end the employer/employee relationship. Rather CGC submits that the inclusion of the reference "your employment" in our

[35] See Tower Industries Inc. 349 NLRB 1077 (2007) and First National, supra, dissenting opinion member Oviat.

case constitutes a waiver of employee rights to file unfair labor charges and/or grieve future rights. A contrary interpretation is clearly implausible, as in paragraph 4 (d), the Respondent enumerates a long list of multiples laws and potential causes of actions that the employees were expressly required to waive as a condition to return to work, including, but not limited to, unjust termination. CGC submits that the inclusion of such language in paragraph 4(d) clearly demonstrates that the waiver is not directed to settle the disciplinary action in question, "a suspension," but, rather it encompasses a waiver of employee rights for future claims or causes of actions, including their potential termination for alleged violations of the terms of the agreement.

The Board in Mandel Security Bureau, 202 NLRB 117, 119, (1973) confirmed the ALJ decision that because the return of employee Black's was conditioned to the withdrawal of the charges and forebearance from future charges and concerted activities, the ALJ found that Respondent violated Section 8(a) (1) of the Act. In reaching said decision, it was noted that event though Black himself may have been partially responsible for instigating the deal, future rights of employees, as well as the rights of the public, may not be traded away in this manner.[36]

Lastly, although the Respondent, in its attempt to defend the language of the last chance agreement, is resorting to technical concepts of contract law interpretation, CGC submits that the review of the last chance agreement has to be examined through the eyes of lay employees who were not represented by legal counsel at the time of executing the waiver. See Tower Industries Inc., 349 NLRB 1077 (2007) were the Board adopted the ALJ analysis that when two portions of a release area conflicting it is necessary to view it from the employees' perspective and noted that "employees may understand that their NLRA rights are unaffected, but may not know the fully panoply of those rights. An employer may not specifically prohibit employee activity protected by the Act and then

[36] Citing Kingwood Mining Co., 171 NLRB 125, (1973).

seek to escape the consequences of the specific prohibition by a general reference to rights protected by the law".

In conclusion, the Respondent's "last chance" agreement is designed to discourage employees from engaging in concerted activities and filing charges or giving testimony under the Act. Therefore, as found by the ALJ, the Respondent violated of Section 8(a)(1) and (4) of the Act by requiring employees to sign its "last chance" agreement as a condition to being reinstated to employment.

b. Discharge of Bermudez, Rivera-Barreto, Correa and Melendez

As discussed previously, the strike they participated in was a protected activity and, therefore, the suspension they received violated section 8(a)(3) of the Act. Accordingly, Respondent's offer of reinstatement should have been unconditional. McKesson Drug Co., 337 NLRB 935 (2002). However, as discussed previously, Respondent negotiated a stipulation with the Union, previously referred to as the "last chance" agreement, which allowed some of the employees that participated in the strike to return to work after signing that document. The terms of the "last chance" agreement required employees, including employees Melendez, Rivera-Barreto, Correa and Bermudez, to accept that their strike/protected concerted activities was unlawful and that they had a "last chance" to keep their job. Under said agreement, the employees also accepted that any future violation of company rules would be sufficient to cause their termination irrespective of the severity of the rule.

As reflected in its affirmative defenses in its Answer to the Complaint, employees Melendez, Rivera-Barreto, Correa and Bermudez were all fired by Respondent for not complying with the "last chance" agreement. Respondent did not provide any further explanations as to the reasons they violated said agreement. Therefore, Respondent admits that had it not been for the "last chance" agreement, none of these employees would have been discharged.

Having already determined that Respondent's "last chance" agreement is unlawful, the fact that Respondent discharged employees Melendez, Rivera-Barreto, Correa and Bermudez based on the "last chance" agreement violated Section 8(a)(3) of the Act because the discharges are, in effect, "the fruit of the poisonous tree." FiveCAP, Inc., 331 NLRB No. 157 (2000).[37] Similarly, the discharge of these four employees was the direct consequence of their participation in the protected concerted strike held in October 2008.

Even if a Wright Line[38] analysis were to be applied in the present case, the Respondent failed to met its burden that the discharges would have not been taken absent a discriminatory motive. As the "last chance" agreement reveals, the Respondent admits to its knowledge of the participation of employees Melendez, Rivera-Barreto, Correa and Bermudez in the October 20-22 strike, which as found by the ALJ was an unfair labor practice strike and therefore is clearly protected concerted activity, and that its disciplinary actions, the 30-day suspension and unlawful "last chance" agreement, was based on such activity. Having made out the elements of a prima facie case, the burden of persuasion then shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." Septix Waste, Inc., 346 NLRB 494, 496 (2006)(quoting Donaldson Bros. Ready Mix, Inc., 341 NLRB 958, 961 (2004). To meet its Wright Line burden, "... an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hides Oil & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

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[37] Citing *Oryland Hotel*, 323 NLRB 723, 728-729 (1997) (disciplinary action taken pursuant to an unlawful no-solicitation rule is unlawful) and *McClain of Georgia, Inc.*, 322 NLRB 367, 377 (1996) (discipline imposed as a result of a change in drug testing policy implemented in retaliation for union activity is unlawful; "where a policy or rule is changed in retaliation for union activity by some employees, every individual affected by the changed policy is discriminated against, regardless of their individual union sentiments").

[38] 251 NLRB 1083, 1089 (1980), enfd. 662 F. 2nd 899 (1st Cir. 1981), cert. Denied 455 US 989 (1982).

In the present case, the Respondent failed to present a legitimate reason for the discharge of said employees. The Respondent did not proffer any other explanation for its discharge other than that it was based on their failure to comply with the terms of the afore-mentioned agreement. Thus, even under a Wright Line analysis, Respondent has not meet its burden and, therefore, it violated Section 8(a)(3) and (1) of the Act by discharging employees Melendez, Rivera-Barreto, Correa and Bermudez.

V. CONCLUSION

In view of the above and on the record as a whole, CGC submits that the record established as found by the ALJ in its Decision that:

(a) The Respondent violated Section 8(a) (1) and (3) of the Act, by suspending shop steward Miguel Colon on September 10 and thereafter terminated him on October 10.

(b) The October 20-22 strike was an unfair labor practice strike to protest the suspension and discharge of the five shop stewards, including that of Miguel Colon and to reconvene the parties' successor collective bargaining negotiations that had ceased on September 9.

(c) The terms of the "last chance" agreement are overly broad and are unlawful under the Act, as it restricts employees in the exercise of Section 7 rights.

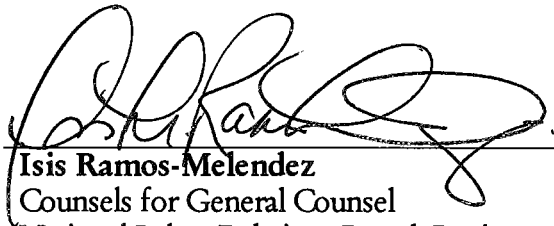
(d) Respondent coerced employees Luis Bermudez, Jose Rivera-Barreto, Virginio Correra and Luis Melendez into signing the "last chance" agreement in violation of Sections 8(a) (1) (3) and (4)of the Act that conditioned their reinstatement from their suspension on the relinquishment of their right to file unfair labor charges or give testimony to the Board.

(e) Respondent violated Sections 8(a) (1) and (3) of the Act because the discharges of Luis Bermudez, Jose Rivera-Barreto, Virginio Correra and Luis Melendez were directly related to the four employees participation in the unfair labor practice strike and, but for that action, the employees would not have executed the "last chance" agreement.

CGC requests that the ALJ's findings in this regard be affirmed. Accordingly, in order to remedy these violations, it is requested that a Board Order be issued ordering the Respondent to reinstate Miguel Colon, Luis Bermudez, Jose Rivera-Barreto, Virginio Correra and Luis Melendez and to make them whole for any losses they may have suffered as a result of Respondent's unlawful conduct and to remove from Respondent's files any reference to their unlawful discharges; the rescission of the last chance agreement; and, to post at its Cayey facility an appropriate Notice to Employees in both English and Spanish languages, as is customary in Region 24, remedying Respondent violations and any further relief deemed just and proper.

Dated at San Juan, Puerto Rico, this 19th day of July 2010.

Ana Beatriz Ramos-Fernández



Isis Ramos-Melendez
Counsels for General Counsel
National Labor Relations Board, Region 24
La Torre de Plaza, Suite 1002
525 F.D. Roosevelt Ave.
San Juan, P.R. 00918-1002
Telephone (787) 766-5276
E-mail: ana.ramos@nlrb.gov
isis.ramos-melendez@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that on this same date a true copy of the "COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT EMPLOYER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE" has been served on the following parties via Electronic Mail:

Jose Adrian Lopez-Pacheco
PMB 439
PO Box 10000
Canovanas PR 00729
e-mail: joseadrianlopez@yahoo.com

Miguel A. Colon-Torres
Maton Arriba
HC-44 Box 12676
Cayey PR 00736
e-mail: miguelillo2353@yahoo.com

Julian J. Gonzalez, Esq.
428 Stratford Rd # 40
Brooklyn NY 11218
e-mail: julian.j.gonzalez@gmail.com

Linda Backiel, Esq.
Calle Mayaguez # 70
Oficina 2B
Hato Rey, PR 00918
e-mail: lbackielr@gmail.com

Barbara Harvey, Esq.
1394 East Jefferson Ave.
Detroit, MI 48207
e-mail: blmharvey@sbcglobal.net

Miguel Maza, Esq.
Yolanda Da Silveira, Esq.
Vanessa Marzan-Hernandez, Esq.
Maza and Green
Bolivia # 33, Suite 203
Hato Rey, PR 00917
e-mail: ydasilveira@maza.net
vanessa.marzan@gmail.com

Antonio Santos, Esq.
Urb. Paseo Mayor
8th Street, C-21
San Juan, PR 00926
e-mail: antoniosantos00926@yahoo.com

Agustín Collazo, Esq.
Pierantoni Méndez & Alvarez
Banco Popular Center, Suite 1901
209 Muñoz Rivera Avenue
San Juan, PR 00918
e-mail: acollado@pmalaw.com

e-Gov:
Honorable Board, Washington

Dated at San Juan, Puerto Rico this 19th day of July 2010.

Ana Beatriz Ramos-Fernández
Counsel for General Counsel